



# **Orphan Works**

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# What are Orphan Works?

- Works that are protected by copyright law but for which a potential user cannot identify or locate a legitimate copyright owner (or another party who has authority to license the exclusive right) despite conducting a diligent search.

# Recent History

- - Congressional Request (Jan. 2005)
- -Published Notice of Inquiry(Jan. 2005)
- -Rec'd More than 850 Public Comments
- -Roundtables in DC and CA (July 2005)
- -Meetings with Interested Parties
- -Jan. 2006 Report on □Orphan Works
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# Summary of Report



- There is a real Orphan Works problem and it Forestalls Productive and Beneficial Uses
- Broad response from content-owners as well as traditional user groups and private individuals
- Involves Unpublished, Published, American and Foreign works
- Affects those who want to use a single work on an occasional basis as well as those who want to build programming around multiple, related works

# USCO Recommended New Statutory Framework



- Provide a New Limitation on Remedies: New §514
- Remove Statutory Damages and Attorneys Fees
- Conditions for Eligibility: Search; Attribution
- Search Must be Diligent but Search Criteria Flexible
- Reasonable Compensation (Davis v. Gap definition)
- Narrow Safe harbor
- Limited Injunctive Relief
- Savings Clause for Applicable Limitations/Defenses



# Congressional Hearings

- 109th Congress: Two Hearings and Significant Industry Negotiation in 2006; Ran Out of Time
- Major Support from Copyright Office, Cultural Institutions, Book Publishers, Documentary Filmmakers
- Concerns Expressed by Photographers, Illustrators and Other Visual Artists

# 110th Congress

- For past year, discussions with industry groups and consideration of constructive suggestions
- Forthcoming Subcommittee Hearing: March 13, 2008

## Provisional Witness List

Marybeth Peters, Register of Copyrights

Holocaust Museum

Association of American Publishers

American Society of Media Photographers

PicScout (Image Recognition)

# Current Issues



- Statute must provide clearer guidance as to Search Criteria
- Search Criteria should incorporate Industry Guidelines or “Best Practices;” Copyright Office should collect, formulate and make these available
- Copyright Office Should Certify Electronic Databases that Purport to Match Users with Owners, especially those related to PGS works; Technology Briefing
- Statute should spell out that Legal and/or Beneficial Owners are entitled to pursue Reasonable Compensation (§ 501(b))





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- Injunctive Relief Should not be Available When the User has added Substantial or Significant New Expression
- User should have to plead Orphan Works and basis for asserting it early in litigation, rather than during remedy phase of a trial
- Attorneys Fees if Bad Faith Negotiation of RC
- Small Claims Study
- Continued Discussions as to Scope of Orphan Works